IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO. 39 OF 2006

IN

NOTICE OF MOTION NO. 3685 OF 2005

IN

SUIT NO. 3212 OF 2005

ALONGWITH

CROSS-OBJECTION NO. 3/2006.

MULTIPLEX COLLAPSIBLE TUBES LTD. ... APPELLANTS.

VS.

NALIN PRATAPSINH THACKER ... RESPONDENT.

DR. V.V.TULZAPURKAR SR. AVOCATE WITH P.K.SAMDHANI SR. ADVOCATE AND MR. DASGUPTA I/B J.NARULLA & ASSOCIATES - FOR APPELLANT IN APPEAL NO. 39 OF 2006 AND RESPONDENT IN CROSS-OBJECTION NO. 3/06

MS. USHA PUROHIT FOR APPELLANTS IN CROSS-OBJECTION NO. 3/06 AND FOR RESPONDENT IN APPEALNO. 39 OF 2006.

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CORAM : J.N.Patel and A.A.Sayed, JJ.

DATE : July 25, 2007.

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P.C.

1. Heard the learned Counsel for the parties.

2. The original plaintiff has preferred this Appeal, impugning the Order dated 25th January, 2006, passed by the Single Judge, wherein the notice of motion taken out by the Plaintiff for grant of temporary injunction, came to be disposed of by vacating the ad interim Order.

3. Few facts, which persuade us to remit back the matter to the learned Single Judge of the Trial Court, can be culled out as under :-

4. Parties to the Suit entered into an agreement to purchase the suit property for a consideration of 7,60,00,000/-. The said agreement came to be entered into on 2.9.2004 and an amount of Rs. 76 lac was paid by the Plaintiff to the defendant by way of earnest money. It was agreed that the sale deed would be executed on 15.11.2004. It appears that by letter dated 10.11.2004, it was communicated on behalf of the defendant that since some outstanding issues remained to be resolved between the parties,

it was not possible to complete the transaction till 15.11.2004, therefore, it came to be extended, which is strongly disputed by the learned Counsel appearing for the respondent- original defendant.

5. The learned Single Judge though arrived at a finding that the appellant-plaintiff had made out a prima facie case, observed that " ... Therefore, I put it to the learned Counsel appearing for the plaintiff that if the plaintiff claims to be ready and willing to perform his part of the contract, to show his willingness whether the plaintiff is willing to deposit balance amount of the consideration in the Court. The learned Counsel appearing for the Plaintiff states that the plaintiff is willing to deposit the amount in the Court only if the Court directs the defendant to hand over possession of the property. In my opinion the condition subject to which the plaintiff contends that he is willing to deposit the amount, is not valid. Till the suit is decreed, the defendant cannot be asked to hand over possession of the property on the plaintiff depositing the amount. Therefore, without the plaintiff depositing the amount, locking up the said valuable property in my opinion will not be in the interest of justice. Granting of injunction without

the plaintiff depositing amount in the Court may result in causing irreparable injury to the defendant's interest. The plaintiff, therefore is not entitled to any ad interim order. Ad interim order earlier passed is vacated."

6. On arriving at such a conclusion, the learned Single Judge observed that granting the injunction without the plaintiff depositing amount, will cause irreparable loss and therefore, the Plaintiff is not entitled to any ad interim Order, which was earlier passed, was vacated and the notice of motion was disposed of.

7. On going through the impugned Order, we are of the view that the learned Single Judge has not considered the notice of motion taken out by the appellant-plaintiff on merits and restricted the findings only to assess whether an ad interim Order earlier granted by the Court deserves to be continued

8. Therefore, with all humility at our command, we are required to observe that the learned Single Judge disposed of the Notice of Motion without dealing with the same on merits.

9. We need not lay emphasis on the settled principle that ordinary rule is that specific performance should be granted. It can only be refused when equitable considerations warrant it and circumstances show that damages would constitute an adequate relief. In such cases Court has to consider question regarding existence of a prima facie case, which involves finding of fact as to whether a case for trial is made out as also whether other factors requisite for grant of injunction exist, Court has also to consider balance of convenience of the parties and irreparable injury, if any that might be suffered by the plaintiff in case of refusal to grant injunction. Once the Court is satisfied, then the foremost concern will be to preserve the suit property till the decision of the Suit. The impugned Order does not deal with all these aspects. Therefore, we quash and set aside the impugned Order and the matter is remitted back to the Single Judge to decide the notice of motion on merits. Needless to say that in the meantime, the parties to maintain status quo in so far as it relates to the suit property as on the date of the passing of the impugned Order.

10. In view of the fact that we have remanded matter for de-novo hearing, the cross-objection does not survive.

11. The Appeal stands disposed of in the aforesaid terms with no Order as to costs.

[J.N.Patel, J.]

[A.A.Sayed, J.]